Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's dispositive order containing an explanation of the court's reasoning satisfies the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure, such that the time for appeal begins to run from the entry of the order.

2. Whether a district court's dispositive order adopting the report and recommendation of a magistrate judge satisfies the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure, such that the time for appeal begins to run from the entry of the order.

LIST OF PARTIES

All parties do not appear in the caption on the cover page. A list of all parties to the proceeding in the court of appeals is as follows:

Patricia Kidd

The District of Columbia

Anthony Williams and Marion Barry, each in his official capacity as Mayor of the District of Columbia

John Payton

Marty Grossman

Eugene Adams

Ric Murphy

Lorraine Britton

Lorraine Greene

William Reddick

Timothy Edwards, in his official capacity as Associate Director for Real Property of the Department of Administrative Services of the District of Columbia

Raymond Lambert

Robert King

Warren Cruise

Bruce Marshall, in his official capacity as Director of the District of Columbia Department of Administrative Services of the District of Columbia.

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PETITION FOR WRIT OF CERTIORARI

Patricia Kidd petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dismissing her appeal as untimely. A divided panel of the court of appeals ruled that Petitioner filed her pro se notice of appeal eleven days late, holding that her time to appeal ran from the district court's entry of an order dismissing some of her claims. The premise of this holding was that the dismissal order was a judgment entered on a separate document within the meaning of Fed. R. Civ. P. 58.

The majority acknowledged that its decision conflicted with the decisions of three other courts of appeals. When the full court of appeals later denied a petition for rehearing en banc by a 5-4 vote, the four dissenting judges issued a statement that the case raised "a question of exceptional importance" because "the panel decision will produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.) Petitioner seeks this Court's review to address this important question and resolve the conflict in the circuits.

OPINIONS BELOW

The D.C. Circuit's decision (App. 1a) is reported at 206 F.3d 35 (D.C. Cir. 2000), and the order denying rehearing en banc with a dissenting statement (App. 28a) is published at 214 F.3d 179 (D.C. Cir. 2000). The orders of the United States District Court for the District of Columbia (App. 22a, 24a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2000. Petitions for rehearing and for rehearing en banc were denied on June 2, 2000. (App. 26a, 27a, 28a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). . . .

Rule 4(a) of the Federal Rules of Appellate Procedure provides in pertinent part:

> **(1) Time for Filing a Notice of Appeal.**
>
> **(A)** In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

STATEMENT OF THE CASE

A. The History And Purpose Of The Rule 58 "Separate Document" Requirement

Rule 58 performs an extraordinarily important function in the federal judicial system, because it defines when the jurisdictional time limits on a civil appeal begin to run. Rule 58 provides that a final appealable judgment is "effective only when" it is "set forth on a separate document." Fed. R. Civ. P. 58. Thus, the jurisdictional appellate deadlines dictated by Fed. R. App. P. 4 do not begin to run until the district court enters judgment in this manner.

Because a district court can dispose of a case in a variety of ways, a number of different types of orders may be issued during the concluding stages of litigation. Litigants must know which order represents the final judgment in order to protect their appeal rights. As the Court explained in granting certiorari in an earlier Rule 58 case, this seemingly mundane procedural issue is fundamentally important:

> A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.[1]

1. The Version Of Rule 58 In Effect Before 1963

This Court has granted certiorari to clarify Rule 58's requirements on several occasions during the past fifty years. In *United States v. F. & M. Schaefer Brewing Co.*, the Court

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[1] *United States v. Indrelunas*, 411 U.S. 216, 217-18 (1973) (granting certiorari).

considered whether the government's time to appeal ran from the date the clerk filed an opinion granting summary judgment in favor of a taxpayer, or from the subsequent date when the district judge signed "a formal document captioned 'Judgment.'" 356 U.S. 227, 229 (1958). Under the version of Rule 58 in effect at the time, the law was settled that no particular "form of words . . . is necessary to evince [the] rendition [of a judgment]." *Id.* at 232 (quoting *United States v. Hark*, 320 U.S. 531, 534 (1944)). Rather, to determine whether the earlier opinion embodied a "final decision," the Court applied a subjective test—whether "the judge has or has not clearly declared his intention in this respect in his opinion." *Id.* at 232. Because the district court's opinion had not specified the amount of interest to be awarded, or even a method for calculating it, neither the judge, the clerk, nor the appellee "understood the opinion to be the judge's final act or to constitute his final judgment in the case." *Id.* at 235-36. The Court held that under the specific facts of that case, the time to appeal began to run from the entry of the formal judgment, not the earlier opinion. *Id.* at 236.

2. The Adoption Of A "Separate Document" Requirement In 1963

The government had argued in *Schaefer Brewing* "that practical considerations require that a final judgment be contained in a separate document so labeled." 356 U.S. at 231. The Court rejected this argument: "Whatever may be the practical needs in these respects, the answer is that no present statute or rule so requires . . . ." *Id.* at 232. However, in 1963, Rule 58 was amended to essentially its present form, containing the sort of "separate document" require-

ment the government had sought in *Schaefer Brewing*.[2]

The advisory committee explained that the change was motivated by the fact that in the past, "some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., 'the plaintiff's motion [for summary judgment] is granted.'"[3] Such ambiguous documents confused both litigants and courts as to when judgment was entered and the time for appeal commenced to run:

> Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal.

Id. The advisory committee explained that the Rule was intended to clarify what constitutes a judgment by requiring that it be separate and distinct from other documents:

> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memo-

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[2] Rule 58 was amended again in 1993, but only with respect to the effect of motions for attorneys fees. *Compare* 28 U.S.C. Appendix, at 783-84 (1994) (current version of Rule 58) *with* 28 U.S.C. Appendix, at 672 (1988) (pre-1993 version of Rule 58).

[3] Fed. R. Civ. P. 58, Notes of Advisory Committee on Rules—1963 Amendment, 28 U.S.C. Appendix, at 784-85 (1994) (citing *Schaefer Brewing*).

> randum—which provides the basis for the entry of judgment. That judgment shall be on separate documents is also indicated in Rule 79(b) . . . .

Id.

Notwithstanding the clarifying change to Rule 58, ten years later the Court again granted certiorari to explain what action by a district court constituted final judgment from which the time for appeal ran. In *United States v. Indrelunas*, 411 U.S. 216 (1973), the Court held that the time for appeal began to run from the entry of a formal judgment and not from the earlier date of a jury verdict. Citing *Schaefer Brewing* as an example, the Court explained that "[p]rior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty." *Id.* at 220. Rule 58 had been amended "to require that a judgment was to be effective only when set forth on a separate document" in order to "eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter." *Id.* The Court explained that the separate document requirement "is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." 411 U.S. at 221-22 (citing 6A James Wm. Moore, *Federal Practice* ¶ 58.04 [4.-2], at 58-161 (1972)).

3. The Court's Limited Waiver Of The "Separate Document" Requirement

The Court has countenanced only one departure from the "mechanical" application of the Rule 58 separate document requirement. In *Bankers Trust Co. v. Mallis*, the Court held that the "parties to an appeal may waive the separate judgment requirement of Rule 58." 435 U.S. 381, 387 (1978). The Court reaffirmed the holding of *Indrelunas* that "the

separate-document rule must be 'mechanically applied' in determining whether an appeal is timely," but explained that "[t]he need for certainty as to the timeliness of an appeal . . . should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." *Id.* at 386. A separate document need not be required unless it is necessary to protect appeal rights:

> Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.

Id. at 385. Rule 58, the Court held, "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Id.* at 386.

This Court has not returned to address the requirements of Rule 58 since it decided *Bankers Trust* twenty-two years ago. During the interim, the lower courts have divided over how to distinguish orders that do not cause the appeal time to run from similarly phrased judgments that do. In addition, an intractable circuit conflict has developed on the specific question whether a district court order adopting a magistrate judge's report and recommendation can ever constitute a Rule 58 "separate document." It is these important questions that now require clarification by the Court.

B. This Litigation

Petitioner Kidd filed this action, pro se, charging that various actions by her employer, the District of Columbia's Department of Administrative Services, constituted retaliation for her prior successful sexual harassment lawsuit

against her supervisors. Following a trial in the prior suit, she was awarded some $300,000 in compensatory and punitive damages for sexual harassment and intentional infliction of emotional distress. When she returned to work immediately after the trial, she was placed back under the supervision of the very same individuals who had just been found personally liable to her. The retaliatory actions of these individuals, and the strain of the hostile work environment, compelled Petitioner to file this case. (*See* App. 3a.)

The district court dismissed some of Petitioner's claims in August 1994, and directed her to replead her Title VII and constructive discharge claims with greater specificity. (App. 22a.) The court of appeals dismissed Petitioner's appeal from this order on the ground that it was interlocutory.[4] Petitioner filed an amended complaint, and also filed a separate action under the Rehabilitation Act. (*See* App. 3a.) The district court consolidated the two actions and referred the matter to a magistrate judge. (*Id.*)

The parties filed dispositive motions in 1997, and the magistrate judge issued a report and recommendation that summary judgment should be entered in favor of Respondents. (App. 3a-4a.) Petitioner timely filed objections to the magistrate judge's report and recommendation. (App. 4a.) In a document captioned "Order," filed March 20, 1998, the district court denied these objections, holding that "Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation." (App. 24a.) The district court also entered several other orders on that same date, but it did not

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[4] *See Kidd v. District of Columbia*, No. 94-7177, 1995 WL 118021 (D.C. Cir. Feb. 7, 1995) (holding that Aug. 3, 1994 order was not final).

enter any document captioned "judgment."

Petitioner did not receive immediate notice of the order granting summary judgment, nor did she obtain a copy of it until she personally obtained one from the district court on April 28, 1998. (App. 4a, 33a, 37a.) On April 30, 1998, forty-one days after entry of the order, Petitioner filed a pro se Notice of Appeal from "all orders" entered against her in both of the consolidated cases. (App. 32a.)

C. The Court Of Appeals Dismissal

After full briefing and argument, a divided panel of the court of appeals dismissed the appeal as untimely.[5] (App. 1a-11a.) The court held that the time to appeal ran from the date the district court entered its order adopting the magistrate judge's report and recommendation. Petitioner, proceeding pro se, had filed her appeal forty-one days after that order. Because Fed. R. App. P. 4(a)(1)(A) requires filing the notice within thirty days after judgment, the court held that the appeal was untimely. (App. 4a.)

The majority expressly recognized that its decision conflicted with decisions of other circuits, stating that "[i]n the wake of *Shalala v. Schaefer*, 509 U.S. 292 (1993), however, a number of circuits have concluded that orders adopting magistrate's reports cannot serve as judgments for purposes of Rule 58." (App. 7a.) The majority rejected the reasoning of these decisions, stating that it was "uncertain how [they] can be extracted from *Schaefer*." (App. 8a.)

The majority also addressed how to distinguish a Rule 58 separate document from other orders the district court may

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[5] Because Petitioner was proceeding pro se, the court of appeals appointed McKenna & Cuneo, L.L.P. to participate as *amicus curiae* in support of her position. The firm now represents Petitioner in this Court.

enter. The majority stated that "at some point, the inclusion of legal reasoning and authority makes an order into a combined decision and order," and not a judgment, but that in a judgment "some explanation is acceptable—so long as it is very sparse." (App. 6a.) (quoting *Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985)). The court held:

> Under *Diamond*, the order here is a Rule 58 judgment. Apart from a reference to the motions being decided, and one conclusory sentence of justification, it consists simply of ordering clauses. It is even free of the single citation to authority that *Diamond* allows.

(App. 7a.)

The majority emphasized that "when a district court enters its final order disposing of the remaining claims in a case before it, it should ideally enter a second, separate document specifically labeled 'judgment' corresponding as closely as possible to Forms 31 and 32 attached to the Federal Rules of Civil Procedure," and suggested that "pro se litigants be given a simple form explaining the timing requirements for appeal when a final adverse judgment is entered." (App. 10a-11a) (citing *Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 164 (D.C. Cir. 1996)). But these suggestions came too late to benefit Petitioner's pro se appeal. The court held that the order adopting the magistrate judge's report and recommendation "qualifies as a judgment under Rule 58," and therefore dismissed the appeal. (App. 10a.)

Judge Tatel dissented from the panel's decision. (App. 12a-21a.) Judge Tatel found the majority's definition of "separate document" under Rule 58 unworkable:

> The standard my colleagues now adopt—an order is a Rule 58 judgment so long as it contains only 'sparse' reasoning, Maj. Op. at 6—will require this court, contrary to the Supreme Court's warning against

> "case-by-case tailoring of the 'separate document' provision," *Indrelunas*, 411 U.S. at 221, to develop a common law of "sparseness."

(App. 17a.) Instead, Judge Tatel would adopt a "bright line" rule: "Orders containing the district court's reasoning, three sentences or one, several citations or none, are not judgments within the meaning of Rule 58." (App. 17a.) "Such a procedure," said Judge Tatel, "would provide the certainty Rule 58 demands, prevent accidental loss of appeal rights, and ensure that this court will never again have to address this issue." (*Id.*)[6]

Petitioner (proceeding pro se) and *amicus curiae* McKenna & Cuneo, L.L.P. filed timely petitions for rehearing and rehearing en banc. The panel denied rehearing, and by a 5-4 vote, the full court of appeals denied rehearing en banc. (App. 26a-30a.) The four dissenting judges—Chief Judge Edwards and Judges Sentelle, Tatel, and Garland—stated that the case raised "a 'question of exceptional importance' because the panel decision will produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.)

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[6] Having found the appeal timely, Judge Tatel went on to conclude that the case should be reversed on the merits:

> Even a cursory review of Kidd's *pro se* filings should have demonstrated to the magistrate judge who disposed of Kidd's case in three conclusory sentences that Kidd's primary allegation—that she was denied a promotion by the very District of Columbia officials against whom she had just won a substantial verdict for intentional infliction of emotional distress stemming from sexual harassment and forced sodomy by her supervisor—presented a strong prima facie case of retaliatory failure to promote as well as sufficient evidence of pretext to survive summary judgment.

(App. 17a.)

REASONS FOR GRANTING THE PETITION

The issue in this case is a vital one upon which the right of appeal in civil litigation may turn: Whether a district court order dismissing a case and containing some legal reasoning satisfies the requirement of Rule 58 that "[e]very judgment shall be set forth on a separate document." Fed. R. Civ. P. 58. Although the Court has addressed the need for a separate document under Rule 58 several times, it has yet to clarify the contents of such a separate document so that litigants may distinguish a final judgment, which initiates the running of jurisdictional appellate time limits, from other orders in a civil case.

The circuits are in direct conflict as to the specific issue raised by this case: whether a brief order adopting the report and recommendation of a magistrate judge satisfies Rule 58, or whether an additional, "separate document" must also be entered for the appeal time to run. More generally, uncertainties about the form and content of a Rule 58 separate document have caused discord and confusion among the circuits, of which this case is but one example.

In dissenting from the denial of rehearing en banc, four judges of the D.C. Circuit believed the issues raised by this case to be of "exceptional importance," and predicted that the panel decision would "produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.) This Court should grant certiorari to resolve a direct conflict in the courts of appeals concerning the application of Rule 58 to an order adopting a magistrate judge's report and recommendation, and to end the lower courts' general confusion as to what documents do and do not satisfy Rule 58.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The D.C. Circuit's decision establishes a mature conflict among the circuits concerning the "separate document" requirement of Rule 58. In holding that an order adopting the report and recommendation of a magistrate judge satisfies the requirements of Rule 58 and causes the time to appeal to begin running, the D.C. Circuit has deepened a split among six other circuits that requires this Court's resolution. The D.C. Circuit expressly acknowledged this split, recognizing that its decision conflicted with "a number of circuits [that] have concluded that orders adopting magistrate's reports cannot serve as judgments for purposes of Rule 58." (App. 7a.)

A. Decisions Of The D.C., Fifth, Eighth And Tenth Circuits Conflict Directly With Decisions Of The Third, Ninth And Eleventh Circuits

The D.C. Circuit's holding that an order adopting a magistrate judge's report and recommendation can qualify as a Rule 58 judgment on a "separate document" agrees with the law of the Fifth Circuit, which the D.C. Circuit cited with approval. (App. 9a.) As the Fifth Circuit explained: "The mere fact that the first sentence of the order adopts the magistrate's report and recommendation, does not require that two documents be used by the district court rather than one." *United States v. Perez*, 736 F.2d 236, 237 (5th Cir. 1984). The Eighth Circuit in *Mason v. Groose*, and the Tenth Circuit in *Laidley v. McClain*, also have held that an order adopting a magistrate's report and recommendation can be a

Rule 58 "separate document." [7]

However, the Third, Ninth, and Eleventh Circuits have reached the opposite conclusion, holding that an order adopting a magistrate judge's report and recommendation does *not* satisfy Rule 58 alone, but rather requires entry of another judgment document to begin the running of the time for appeal. These circuits base their reasoning on *Shalala v. Schaefer*, 509 U.S. 292 (1993).[8] The Court's opinion in *Shalala v. Schaefer* did not expressly discuss orders adopting the reports and recommendations of magistrate judges. However, in *Newsome v. Shalala*, the Eleventh Circuit quoted the petition for certiorari in *Shalala v. Schaefer*, which revealed that the order found not to satisfy Rule 58 in that case was one adopting the report and recommendation of a magistrate judge. 8 F.3d 775, 779 n.19 (11th Cir. 1993). Finding that the facts in *Newsome* were "identical to those presented in the Supreme Court's recent decision in *Shalala v. Schaefer*," the Eleventh Circuit held that a brief order

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[7] *See Mason v. Groose*, 942 F.2d 515, 516 & n.2 (8th Cir. 1991) (order adopting magistrate judge's report and recommendation constituted a "separate document"); *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990) ("The fact that the first sentence of the order adopted the report of the magistrate does not require that two documents be used instead of one.").

[8] *Shalala v. Schaefer* concerned the requirement that a claim for attorneys fees under the Equal Access to Justice Act ("EAJA") must be filed within thirty days after a judgment becomes "not appealable." 509 U.S. 292, 293-94, 302 (1993) (discussing 28 U.S.C. § 2412(d)). In *Schaefer*, the Court held that a fee application was timely because the district court had never entered a "formal judgment" in conformity with Rule 58, and thus its decision remained appealable: "Absent a formal judgment, the District Court's April 4 order remained 'appealable' at the time that Schaefer filed his application for EAJA fees, and thus the application was timely under § 2412(d)(1)." 509 U.S. at 303.

adopting the report and recommendation of a magistrate judge did not satisfy Rule 58. *Id.* at 776, 780.

The Ninth Circuit subsequently relied on *Newsome* to hold that an order which "consists only of a district court's adoption of magistrate's recommendation is not a separate document for Rule 58 purposes." *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994). Similarly, in *Kadelski v. Sullivan*, the Third Circuit held that an order adopting a magistrate judge's report and recommendation could not be a Rule 58 "separate document." 30 F.3d 399 (3d Cir. 1994). Following *Newsome* and *Yang*, the Third Circuit concluded that *Mason v. Groose*, *Laidley v. McClain*, and *U.S. v. Perez* had been overruled by *Shalala v. Schaefer*, "which involved a remand order precisely similar to this case adopting the Report and Recommendation of a magistrate judge, and in which the Court held that such order does not satisfy Rule 58 unless a separate document of judgment is entered." *Kadelski*, 30 F.3d at 402.

Thus, seven circuits have now considered the question whether an order adopting a magistrate judge's report and recommendation can be a "separate document," and they have come to diametrically opposite conclusions. The Fifth, Eighth, Tenth and D.C. Circuits have held that a brief order adopting the report of a magistrate judge can constitute a "separate document" under Rule 58. But the Third, Ninth, and Eleventh Circuits have held, based on *Shalala v. Schaefer*, that such an order *cannot* satisfy Rule 58.[9] Nor

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[9] *Newsome* concludes with a statement that the "holdings in this opinion are confined to Social Security cases." 8 F.3d at 780. However, given that Social Security cases are governed by the same Federal Rules of Civil Procedure as other lawsuits, it is not clear how the holding could be limited to that class of cases.

can these cases be distinguished on their facts; the orders held not to satisfy Rule 58 in *Kadelski*, *Yang*, and *Newsome* are comparable in form to the order that the court below held was a "separate document."[10]

This direct conflict, explicitly acknowledged by the majority opinion below, is unlikely to be resolved without intervention by the Court. The decisions at issue span a sixteen-year period, and there is no sign of any attempt by the lower courts to reconcile the conflict. Furthermore, the circuit split is deeply ingrained in the lower courts' jurisprudence because they disagree fundamentally about whether this Court already has spoken to the issue, in *Shalala v. Schaefer*. Recognizing that its decision conflicts with *Kadelski*, *Yang*, and *Newsome*, the court below professed itself "uncertain how these decisions can be extracted from *Schaefer*," which, according to the D.C. Circuit, "rested on the Court's assumption—entirely valid in view of the positions of the parties—that the order's compliance with Rule 58 was not before it." (App. 8a.) *Shalala v. Schaefer*, it said, "cannot be read as having resolved the question of whether the adoption of a magistrate's report prevents an order from serving as a judgment." (*Id.*) By contrast, the Third, Ninth, and Eleventh Circuits read *Shalala v. Schaefer* as dictating the opposite result. Because the circuits base their decisions on different readings of the Court's decision in *Shalala v. Schaefer*, which says nothing explicitly about the question at issue, they are unlikely to resolve the conflict without guidance from this Court. Thus, the conflict is fully mature and

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[10] *See Kadelski*, 30 F.3d at 400 n.1 (quoting order); *Yang*, 22 F.3d at 216 (characterizing order as a "terse, *pro forma* document that did not contain any analysis of the issues, but merely adopted the magistrate's recommendation"); *Newsome*, 8 F.3d at 776 (quoting order).

ripe for resolution by the Court.

B. The Issue Giving Rise To The Conflict Has Profound National Significance

The question whether an order adopting a magistrate judge's report and recommendation may serve as a "separate document" has profound national significance. This Court has made clear as a general matter that conflicts as to what constitutes entry of judgment under Rule 58 are fundamentally important: "A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered." *Indrelunas*, 411 U.S. at 217-18. Thus, the Court has previously granted certiorari "[b]ecause of an asserted conflict among the circuits and the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken from the judgments of District Courts . . . ." *Schaefer Brewing*, 356 U.S. at 230-31.

Moreover, the specific procedural context of this case—disposition through the report and recommendation of a magistrate judge—is a commonly recurring one. According to data published by the Administrative Office of the United States Courts, such dispositions have totaled roughly 9,000-10,000 cases nationwide per year, for every year since 1995. During the year ended September 30, 1999, for example, 9,989 matters were disposed of on the report and recommendation of a magistrate judge.[11] The lower courts are in great

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[11] *See* Leonidas Ralph Mecham, *Judicial Business: 1999 Annual Report of the Director*, Tables 5-18 and M-4A, *available at* ‹http://www.uscourts.gov/ judbus1999/ supps.html›.

need of guidance to ensure that cases disposed of through this common procedural mechanism are handled in a manner that preserves appeal rights.

Accordingly, the Court should grant the petition to resolve the conflict in the circuits on the question whether an order adopting a magistrate judge's report and recommendation can be a judgment on a "separate document" under Rule 58.

II. THE QUESTION OF WHAT CONSTITUTES A JUDGMENT UNDER RULE 58 HAS CAUSED DISCORD AMONG THE LOWER COURTS

In addition to the direct circuit conflict described above, this case presents the important, recurring issue of how to distinguish a Rule 58 "separate document" from other documents in a civil case. The separate document requirement of Rule 58 was intended to provide certainty to courts and litigants about what actions by a district court would constitute entry of judgment and begin the running of the time for appeal. The Court has explained that the rule is to be "mechanically applied," *Indrelunas*, 411 U.S. at 221-22, and "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Bankers Trust*, 435 U.S. at 386. The Court never has recognized an exception to Rule 58 that resulted in the loss of appeal rights. But in a variety of ways, most of the circuits, including the D.C. Circuit here, have done just that.

Over the course of the two decades since the Court last provided relevant guidance in *Indrelunas* and *Bankers Trust*, the circuits have strayed far from one another as they have struggled to define the contents of a Rule 58 "separate document." Instead of focusing on the requirement of separateness, and hence clarity, the courts of appeals have adopted other standards, such as the length of the document, or whether the district court "intends" to enter final judg-

ment. It is time for the Court to provide corrective guidance and restore Rule 58 to the mechanical device it was intended to be. The Court should grant certiorari to end the lower courts' confusion, and to vindicate the purpose of Rule 58: uniformity and certainty in defining when the time for appeal begins to run.[12]

1. The circuits have disagreed on the extent to which they should identify a "separate document" under Rule 58 by its brevity or its exclusion of reasoning or legal citations. The Second Circuit has held that even a one-sentence document, separate from the court's opinion and containing no legal reasoning or citation, cannot satisfy Rule 58 if it is labeled "order" rather than "judgment."[13] But other circuits have disagreed.

In determining what constitutes a "separate document," a number of circuits have focused on the length of the document. As the Fourth Circuit explained: "In applying the Rule 58 requirement to a given situation, the form and content of the document at issue are determinative. Brevity is an important factor: an order unaccompanied by a long expla-

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[12] The discussion below cites some unpublished circuit decisions that have been provided to the Court under separate cover. The circuits generally disapprove of the citation of their unpublished opinions as circuit precedent. *See* 4th Cir. Rule 36(c); 6th Cir. Rule 28(g); 10th Cir. Rule 36.3. However, such opinions are cited here not as precedent, but only as evidence of the disarray in the circuits.

[13] *Kanematsu-Gosho, Ltd., v. Messiniaki Aigli*, 805 F.2d 47, 49 (2d Cir. 1986). *Accord Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir. 1996) ("we have consistently required that such a document must be 'separate from any judicial memorandum or opinion' and 'must be labeled a judgment'") (citation omitted).

nation is likely to be considered a 'judgment.'"[14] Brevity was a factor in some of the decisions discussed above regarding magistrate judges: the Fifth Circuit held the order in *United States v. Perez* to be a judgment because it was "succinct and to the point," and the Tenth Circuit's decision that the order in *Laidley v. McClain* satisfied Rule 58 was based partly on its brevity.[15]

Other cases have focused on the extent to which the document in question cited legal authority. The Fifth Circuit in *Weinberger v. United States* held that "one citation" in an order did not violate the requirement of Rule 58, although "doubtless very little more would have rendered the order vulnerable to appellant's attack."[16] But in *Diamond v. McKenzie*, the D.C. Circuit held that an order that "provided *several* citations to legal authorities" was not a separate document under Rule 58, though "in some instances, an order may be identified as a judgment even though it con-

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[14] *Hughes v. Halifax City Sch. Bd.*, 823 F.2d 832, 835 (4th Cir. 1987). *Accord Martone v. Connecticut Gen'l Life Ins. Co.*, No. 92-1336, 1992 WL 385245, at *1 n.2 (4th Cir. Sept. 11, 1992) (accepting jurisdiction but stating: "Although a very brief order can serve as both the court's decision and the formal judgment required by Rule 58, where, as here, the three page order contains a procedural history of the case and a somewhat lengthy statement of the court's reasoning, it is better classified as the court's opinion than a Rule 58 judgment order.").

[15] *Perez*, 736 F.2d at 237-38; *Laidley*, 914 F.2d at 1390; *see also Woods v. Wal-Mart*, No. 96-1381, 1997 WL 527668, at *2 (10th Cir. Aug. 27, 1997) (interpreting *Laidley v. McClain* as holding that a "brief order adopting [a] magistrate judge's report and granting summary judgment satisfied" Rule 58).

[16] 559 F.2d 401, 402 (5th Cir. 1977) (refusing to vacate judgment for lack of appellate jurisdiction).

tains citations to legal authority."[17] And in this case, the D.C. Circuit held that the order constituted a separate document because it was "even free of the single citation to authority that *Diamond* allows." (App. 7a.)

Courts also have looked to the degree to which the document contains legal reasoning. One justification the Tenth Circuit gave for deciding that the order at issue in *Laidley v. McClain* satisfied Rule 58, and could not be "considered to be an opinion or memorandum," was that it contained absolutely "*no discussion* of the reasoning behind the court's decision."[18] But other circuits have allowed more reasoning. The Ninth Circuit has held that a "one-sentence explanation of the order" does not prevent it from serving as a separate document under Rule 58: "To allow the one-sentence explanation embodied in the order to transform it into an opinion or memorandum rather than an order would be the proverbial elevation of form over substance."[19] Similarly, the First Circuit has approved of a document whose "only departure from perfect purity of form was the addition of a single explanatory sentence," which the court held was "not sufficient to transform the judgment into a memorandum or opinion."[20] And the D.C. Circuit in the

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[17] 770 F.2d at 227, 230 n.10 (emphasis added).

[18] 914 F.2d at 1390 (emphasis added). *See also Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992) ("Generally orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments if they are intended as the court's final directive and are properly entered on the docket.").

[19] *Hamilton v. Naiki*, 453 F.2d 152, 155 (9th Cir. 1971) (accepting jurisdiction over appeal).

[20] *Nunez-Soto v. Alvarado*, 956 F.2d 1, 2 (1st Cir. 1992) (accepting jurisdiction over appeal).

instant case looked to the fact that the legal reasoning in the order at issue here was "sparse," noting that its precedent "endorses decisions of other circuits allowing inclusion of at least one citation to legal authority and at least a one-sentence explanation of the court's reasoning." (App. 6a) (citing *Diamond v. McKenzie*, 770 F.2d at 230 n.10).

Measuring compliance with Rule 58 by the length of a document, or by how many citations or sentences of reasoning it contains, is unsupported by any clear guiding principle. As Judge Tatel pointed out in dissent in this case, the number of sentences of legal reasoning in a document is quite arbitrary: "Suppose that instead of stating its reasoning in a single sentence, the district court here had broken its one sentence into two . . . . Would this departure from the 'one sentence' rule my colleagues seem to adopt have persuaded them that the order was a combined decision and order?" (App. 15a.) Similarly, Judge Tatel explained why the number of citations can have no logical bearing on whether a document satisfies Rule 58:

> Although this "single citation" standard presumably means that the order would have passed as a Rule 58 judgment even if the district court had cited, for example, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the oft-used authority for Rule 56's summary judgment standard, suppose the district court had also included a citation to one of our cases for the same proposition or even to Rule 56 itself? Would my colleagues then have concluded this was not a Rule 58 judgment?

(App. 15a.) As Judge Tatel succinctly explained: "Rule 58's amendment was intended to end just this type of uncertainty." (App. 15a.)

2. Some circuits have focused on the *intent* of the district court to determine what qualifies as a separate document.

These courts hold that a document satisfies Rule 58 when the district court "intends" that it be a final decision. In relying on the district court's intent, these courts inexplicably follow the approach used in *Schaefer Brewing*, 356 U.S. at 235-36, which was rendered obsolete when the separate document requirement was adopted in 1963. *See supra* at 3-5.

Thus, in *Interfirst Bank Dallas v. Federal Deposit Ins. Corp.*, the Fifth Circuit dismissed as untimely an appeal by the FDIC where the district court had entered no separate document other than an order altering the court's findings and conclusions. 808 F.2d 1105 (5th Cir. 1987). The court based its holding on the fact "[t]he district court order clearly evidenced its intent that the . . . document operate as the final decision in the case. . . . We agree with the district court's reasoning that although Rule 58 should not operate as a trap, it should not be used to give a party the opportunity to cure a procedural error in observing an appellate deadline." 808 F.2d at 1108.[21] Similarly, in *Falls Stamping & Welding Co. v. International Union*, the Sixth Circuit held that a single document satisfied the separate document requirement where "the court's intent was clear, as evidenced by the judge's notation during the pre-trial proceeding."[22]

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[21] In reaching this conclusion, the Fifth Circuit seems also to have interpreted *Bankers Trust*—which held only that an otherwise *timely* appeal need not be dismissed as premature simply because the district court had neglected to file a separate document—as a general license to waive the formalities of Rule 58 and hold an appeal to be *untimely*. The court inexplicably characterized *Bankers Trust* as holding that "an order combining an opinion and a ruling on a motion to dismiss generally satisfied the separate document requirement of Rule 58." 808 F.2d at 1108.

[22] 744 F.2d 521, 526 (6th Cir. 1984). The defendant had claimed that the permanent injunction issued by the district court was a final judgment that prohibited plaintiff from bringing its claim for damages. *Id.* at 525.

(Footnote cont'd on next page)

The Tenth Circuit has held that Rule 58 only requires a separate document "where it is uncertain whether a final judgment has been entered, as where a trial judge writes an opinion or memorandum providing only the basis for the entry of judgment, but containing apparently directive or dispositive words such as 'defendant's motion for summary judgment is granted.'" *United States v. Clearfield State Bank*, 497 F.2d 356, 358 (10th Cir. 1974). Thus, where the "trial judge wrote no opinion or memorandum," and where the district court's language "clearly evidences an intention that the order granting summary judgment constituted a final judgment," the Tenth Circuit held that the order satisfied Rule 58, the appeal time had run, and the district court had properly refused to enter a new judgment. *Id.* at 358-59.[23]

Focusing on the subjective "intent" of the district court is completely inconsistent with both the language and the purpose of Rule 58. Indeed, the separate document requirement

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(Footnote cont'd from previous page.)

Plaintiff argued that a permanent injunction was not a final judgment because, among other things, the district court failed to issue a separate document setting forth a judgment in accordance with Rule 58. *See id.* In holding that the injunction was effective, and the claim for damages precluded, even without a separate document, because the district court's "intent" was clear, the Sixth Circuit interpreted *Bankers Trust* as establishing "the general principle that the requirement of Rule 58 may be waived under certain circumstances," and treated the requirement as "waived" even though one party objected to the finality and form of the document deemed to be a final judgment. *Id.* at 526.

[23] *Accord Woods v. Wal-Mart*, No. 96-1381, 1997 WL 527668, *1-2 (10th Cir. Aug. 27, 1997) ("Rule 58 is not enforced in strictly literal fashion if there is no question about finality; in such a case, the order effecting the challenged disposition may itself constitute the requisite 'separate document.'").

was adopted precisely to create a simple, objective standard. Rule 58 does not permit such "case-by-case tailoring of the 'separate document' provision." *Indrelunas*, 411 U.S. at 221.

3. The circuits in some cases have deemed Rule 58 to be satisfied even where the district court disposed of the claims in a case through a series of orders, so that no single document embodies the complete judgment. The instant case illustrates this problem: the court of appeals here permitted a 1998 order (App. 24a) to serve as a separate document of judgment, even though its status as the case-closing, dispositive document is only apparent when read in context with another document, also captioned "order," that dismissed other claims four years earlier. (App. 22a.).

Other circuits have permitted similarly confusing procedures to satisfy Rule 58. In *Scarfo v. Cabletron Systems, Inc.*, the First Circuit explained that the district court had violated Rule 58 where its "final judgment" consisted of "not one, but a series of orders," which generally were "not self-explanatory" and "refer[red] to an opinion or memorandum of the court to which one must go to understand precisely the meaning of the order." 54 F.3d 931, 936 (1st Cir. 1995). Nevertheless, "[i]n support of our jurisdiction," the court deemed the "sequence of orders" to constitute "the functional equivalent of a 'final judgment'" and accepted jurisdiction over the timely appeal without remanding for entry of a proper judgment. *Id.*

In *Engler v. Township of Spring Valley*, the Sixth Circuit held that an appeal of a denial of qualified immunity was untimely because it should have been taken within thirty days of entry of an order, without waiting for a separate document of judgment. No. 90-3026, 1991 WL 15148, at *2-3 (6th Cir. Feb. 7, 1991). The order in question "cover[ed] a wide variety of separate and independent deci-

sions involved in the ongoing administration of the case," and it indicated that it would be followed within thirty days by a complete opinion explaining the court's reasoning, which in fact was not filed until well over a year later. *Id.* at *2. Although the Sixth Circuit acknowledged that the order in question could not "be readily identified as a final appealable order within the intent of" Rule 58, the court nevertheless held the order "sufficient to start the appellate time running," rendering the appeal untimely. *Id.* [24]

Rule 58 provides that "every judgment shall be set forth on *a* separate document." Fed. R. Civ. P. 58 (emphasis added). It does not provide that cases may be disposed of through a series of orders, however brief. If Rule 58 means anything, surely it means that the disposition of the case must be set forth in a single document that embodies the judgment as to the entire case.

4. The circuits have invented a number of other variations in defining the contents of a Rule 58 "separate document." The Tenth Circuit has held that an "administrative closing order," giving the parties sixty days to reopen the proceedings, "matures into [a] final judgment and, if no action is taken to resolve the case, satisfies the separate document requirement of Rule 58." *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (accepting jurisdiction over appeal). Thus, an order whose finality was conditioned on further action by the parties was deemed to constitute the

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[24] To be sure, some courts have refused to allow a series of piecemeal orders to satisfy the separate document requirement. In *Anderson v. Pierce*, the Sixth Circuit remanded a case to district court for entry of a separate document where a series of orders had dismissed portions of a case, so that it was unclear which order should serve as the document from which the time to appeal should run. No. 84-5996, 1985 WL 12815, at *1 (6th Cir. July 19, 1985).

separate document required by Rule 58.

The Third Circuit inexplicably has permitted an order entered in a completely separate, unconsolidated action to serve as a separate document under Rule 58. The district court resolved an appeal from bankruptcy court in the same order in which it disposed of a motion in a separate patent infringement case involving the same parties. *Clausen Co. v. Dynatron/Bondo Corp.*, 889 F.2d 459, 464 (3d Cir. 1989). Although the court of appeals indicated that it "strongly disapprove[d] of the practice of disposing of separate issues in unconsolidated cases by the use of a single order," it nevertheless concluded that "Rule 58 has been complied with sufficiently to treat the order appealed from as a judgment," and accepted jurisdiction over the appeal. *Id.* at 464.

* * *

The Court should grant certiorari here to resolve the disarray and confusion in the circuits over the contents of a Rule 58 "separate document." Rule 58 plays an essential role in informing parties when their time to appeal begins to run. Here, Petitioner's appeal would have been considered timely in some circuits, even though the court below ruled it untimely here. There should be national uniformity on this important issue.

The confusion among the circuits about what constitutes a "separate document" has been building over the twenty-seven years since the Court directed the "mechanical" application of Rule 58 in *United States v. Indrelunas*, 411 U.S. 216 (1973). The circuits show no sign of being able to establish uniformity on their own. The issues raised by this petition deserve the Court's attention, "for surely such a commonplace affair as the time for appeal should not be permitted to breed litigation." *Schaefer Brewing*, 356 U.S. at 251 (Harlan, J., dissenting).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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August 30, 2000

APPENDICES

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 10, 2000 Decided March 24, 2000

No. 98-7075

PATRICIA KIDD,
APPELLANT

v.

DISTRICT OF COLUMBIA, ET AL., APPELLEES

Consolidated with
No. 98-7100

Appeals from the United States District Court
for the District of Columbia
(No. 92cv02897)
(No. 95cv00611)

Michael J. Haungs, appointed by the court, argued the cause as amicus curiae on the side of appellant. With him on the briefs was *Daniel G. Jarcho*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Patricia Kidd, appearing pro se, was on the briefs for appellant.

James C. McKay, Jr., Assistant Corporation Counsel, argued the cause for appellees. With him on the brief were *Robert R. Rigsby*, Interim Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel. *Lutz A. Prager*, Assistant Deputy Corporation Counsel, and *Sharlene E. Williams*, Attorney, entered appearances.

Before: SILBERMAN, WILLIAMS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* TATEL.

WILLIAMS, *Circuit Judge:* Rule 58 of the Federal Rules of Civil Procedure specifies that every "judgment shall be set forth on a separate document" and that "[a] judgment is effective only when so set forth." The Advisory Committee's Note to the 1963 Amendment adding the provision states that its purpose is to eliminate "uncertainties" that occur when a court has written "an opinion or memorandum containing some apparently directive or dispositive words." See also *United States v. Indrelunas*, 411 U.S. 216, 219 (1973) (per curiam). The problem with such combination documents, said the Advisory Committee, was that they left doubt "whether the purported entry of judgment was effective, starting the time running . . . for the purpose of appeal." Under our decisions a single document that disposes of all remaining claims can satisfy Rule 58 so long as it is sufficiently terse. We find that the order in question here satisfied Rule 58. As a result the notice of appeal was filed out of time, and the appeal must be dismissed.

* * *

In October 1990 a jury in the District of Columbia Superior Court awarded Patricia Kidd $300,000 in compensatory and punitive damages on charges that her supervisors at the District of Columbia's Department of Administrative

Services had engaged in discrimination and intentional infliction of emotional distress. Immediately after the trial, Kidd returned to work at the Department under the supervision of some of the defendants who had been found personally liable to her. (In fact the judgments were ultimately paid by the District.) Unsurprisingly, she found the work environment to be tense and hostile. And after the District denied her repeated requests for transfer and promotion, reassigned many of her job responsibilities to other employees, denied her requests for additional training, and gave her what she considered unfair performance evaluations, Kidd resigned from District employment on July 12, 1993.

Kidd complained to the EEOC. It found no evidence of retaliation but issued a right-to-sue letter in September 1992. She filed suit in December 1992. The district court made several attempts to appoint counsel for Kidd, but all failed. After instructing Kidd to proceed pro se, the court entertained the District's motion to dismiss. It construed Kidd's complaint as alleging retaliation and constructive discharge in violation of § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1994), discrimination in violation of the Equal Pay Act, 29 U.S.C. § 206(d), and 42 U.S.C. § 1981, and denial of her constitutional rights to equal protection and due process made actionable under 42 U.S.C. §§ 1983 and 1985. After examining each claim, the court dismissed all counts with prejudice except for the claims of retaliation and constructive discharge, which it instructed Kidd to replead with greater specificity. Kidd included these claims in amended complaints filed in September and October 1994 and filed a complaint in a second suit in March 1995, alleging violation of § 704 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The district court consolidated the two actions and referred the case both to mediation and to a magistrate judge. In February 1998, the magistrate issued a report and recom-

mendation in favor of the District's summary judgment motion and against Kidd's motion for partial summary judgment. Kidd filed an objection to the magistrate's report, but the district court adopted the report and granted summary judgment in the District's favor on March 19, 1998. As a consequence, no claim of Kidd's survived.

Kidd appeals from the district court's grant of summary judgment and the dismissal of her other claims. But the threshold problem is the District of Columbia's challenge to our jurisdiction. The District argues that the district court's order of March 19, 1998, stating that the District's "Motion for Summary Judgment . . . is GRANTED," qualified as a judgment under Rule 58, so that Kidd's appeal, filed 41 days after its entry, was untimely under Rule 4(a) of the Federal Rules of Appellate Procedure. We agree and therefore dismiss Kidd's appeal.

* * *

The time limits established by Rule 4(a) are "mandatory and jurisdictional." *Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 163 (D.C. Cir. 1996). Kidd offers two theories either of which, if correct, would moot the Rule 58 issue. She first argues that she has shown good cause for her failure to file within the ordinary appeal period. See Fed. R. App. P. 4(a)(5) ("The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)."). Kidd points to compelling evidence—indeed, evidence not disputed by the District—that she received no notice of the district court's order until April 14, 1998 at the earliest, and received no copy until April 28. But Rule 4(a)(5) requires appellants to file a motion requesting an extension of time with the district court. Kidd filed no such motion, and therefore Rule 4(a)(5) is inapplicable. Rule 4(a)(6) also provides an avenue of relief for a party receiving notice as belated as was

Kidd's, but also requires a motion asking the district court to reopen the time for appeal. See Fed. R. App. P. 4(a)(6).

Kidd's second theory is that the district court's order failed to satisfy Rule 58's "separate document" requirement, so that the time for appeal never started running. Before looking at the order, we should explain what a document setting forth judgment must be "separate" from. The Advisory Committee Notes to the 1963 amendment say that the "amended rule . . . require[s] that there be a judgment set out on a separate document—*distinct from any opinion or memorandum*—which provides the basis for the entry of judgment." Fed. R. Civ. P. 58, Advisory Committee's Note to the 1963 amendment (emphasis added). They also say that Rule 58 was designed chiefly to distinguish an actual judgment from "an opinion or memorandum containing some apparently directive or dispositive words." *Id.* The Rules insist in other spots on simplicity and brevity in judgments. See Fed. R. Civ. P. 54(a) (" 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."); *id.* app. Form 31 Advisory Committee's Note 3 ("The Rules contemplate a simple judgment promptly entered."). In light of all this, we've understood Rule 58 as requiring that "the inclusion of legal reasoning and authority" not go to the point of making "an order into a combined decision and order." *Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985).

In its entirety the order here reads as follows:

ORDER

> Pending before the Court is Magistrate Judge Robinson's Report and Recommendation addressing Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) and Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 175). Plaintiff has filed an objection to this Report and Recommendation.

(Docket No. 219). In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation. Therefore, it is hereby

ORDERED that Magistrate Judge Robinson's Report and Recommendation dated February 23, 1998 is AFFIRMED by the Court.

Consequently, it is

ORDERED that Defendant's Motion to Dismiss is DENIED, and that Defendant's alternative Motion for Summary Judgment (Docket No. 175) is GRANTED; and it is further

ORDERED that Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) is DENIED.

March 19th 1998 Thomas F. Hogan /s/
United States District Judge

The Supreme Court has said that Rule 58 is to be "mechanically" applied, *Indrelunas*, 411 U.S. at 221-22, and we have understood that as intended to advance the purpose of "avoid[ing] speculation" on the running of the time limits, *Diamond*, 770 F.2d at 230. But it is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements. Our decision in *Diamond* itself endorses decisions of other circuits allowing inclusion of at least one citation to legal authority and at least a one-sentence explanation of the court's reasoning. See *id.* at 230 n.10. We said that "at some point, the inclusion of legal reasoning and authority makes an order into a combined decision and order," *id.*, confirming that some explanation is acceptable—so long as it is very sparse. Chief Judge Robinson went on to observe in his concurrence that to enforce mechanically did not require enforcing "mindlessly," citing *Weinberger v. United States*, 559 F.2d 401, 402 (5th Cir.

1977), and that "trivial departures [from the official judgment forms, see Fed. R. Civ. P. app. Forms 31, 32] must be tolerated in the name of common sense." *Diamond*, 770 F.2d at 234. He specifically mentioned several examples of trivial departures—not only the inclusion of a single sentence of explanation or citation to authority (both of which were acceptable to the panel), but also "a recital that a magistrate's report and recommendation are being adopted." *Id.* at 234. The latter seems on its face consistent with the "separate document" requirement, as the magistrate's report and recommendation are as separate from the judgment as a district court's opinion.

Chief Judge Robinson also said that "orders combining the court's directives with its statement of factual findings or legal conclusions plainly cannot pass muster as separate documents." *Id.* But in context this statement cannot be read to preclude a single sentence of explanation because the entire panel, with Judge Robinson in full agreement, had already found some minimal amount of legal reasoning to be consistent with Rule 58. See *id.* at 230 n.10. Although our single-citation, single-sentence standard for Rule 58 may well seem arbitrary, see Dissent at 3-5, we think it most proper to follow *Diamond*'s analysis.

Under *Diamond*, the order here is a Rule 58 judgment. Apart from a reference to the motions being decided, and one conclusory sentence of justification, it consists simply of ordering clauses. It is even free of the single citation to authority that *Diamond* allows.

In the wake of *Shalala v. Schaefer*, 509 U.S. 292 (1993), however, a number of circuits have concluded that orders adopting magistrate's reports cannot serve as judgments for purposes of Rule 58. See, e.g., *Kadelski v. Sullivan*, 30 F.3d 399, 400-02 (3d Cir. 1994); *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994). The Eleventh Circuit announced a similar rule but explicitly confined its reasoning to Social

Security cases in general and more specifically to "the narrow facts of this case," *Newsome v. Shalala*, 8 F.3d 775, 775, 778-80 (11th Cir. 1993). The Ninth Circuit noted the Eleventh Circuit's caution, but took "no position with regard to this limitation." *Yang*, 22 F.3d at 216 n.5.

We are uncertain how these decisions can be extracted from *Schaefer*. The case dealt with the seemingly endless snarl of district court dispositions under various sentences of 42 U.S.C. § 405(g), and claims for attorneys' fees under the Equal Access to Justice Act ("EAJA"). The Court, after having rejected various arguments of the Social Security claimant as to why his application for attorney's fees was not out of time, finally accepted his claim that the district court had not entered a judgment complying with Rule 58. The Court said that it was "clear from the record" that no " 'separate document' of judgment" had been entered, 509 U.S. at 303, but also explicitly noted that the government had not claimed that the order in question qualified under Rule 58. See *id.* Indeed, confining the issue to a single footnote in its brief, the government had argued only that the claimant had waived his Rule 58 argument and that a Rule 58 judgment was not necessary for appealability to commence. See Brief for Petitioner, 1993 WL 290124, at *19 n.12 (U.S. Jan. 14, 1993). The Court implicitly rejected the waiver idea. As for the appealability argument, it pointed out that under EAJA the issue was not when appealability began (which in practice happens before the time limit on appealability starts to run), see *Schaefer*, 509 U.S. at 303, citing *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385-87 (1978), but rather whether the appealability time limit had run. Thus the decision rested on the Court's assumption—entirely valid in view of the positions of the parties—that the order's compliance with Rule 58 was not before it. It cannot be read as having resolved the question of whether the adoption of a magistrate's report prevents an order from serving as a judgment.

Moreover, as the claimant's contention that there was no Rule 58 judgment rested on its (mistaken) view that there was no judgment at all, see Respondent's Br., 1993 WL 476403, at *8, *23-*24 (U.S. Feb. 18, 1993), his brief sheds no light on the Court's possible thinking.

We note that in fact, under *Diamond*, the *Schaefer* order might well *not* have satisfied Rule 58. (The text is printed in *Newsome*, 8 F.3d at 779 n.19.) The *Schaefer* order contains three sentences of "reasoning," couched in the form of a paraphrase of the magistrate's order. This is almost certainly excessive under *Diamond*.

We also note that Chief Judge Robinson's view—treating an order as Rule 58-qualifying where it recites that a magistrate's report is being adopted—rested on the Fifth Circuit's decision in *United States v. Perez*, 736 F.2d 236, 237 n.3 (5th Cir. 1984). It might be objected that in *Perez* the Fifth Circuit distinguished cases where the district court had granted summary judgment, and arguably confined the decision to the habeas corpus context. But the Fifth Circuit so limited its opinion only because its prior cases had established that a single document granting summary judgment could never satisfy Rule 58's requirements, see *Perez*, 736 F.2d at 237 n.3; *Calmaquip Eng'g West Hemisphere Corp. v. West Coast Carriers, Ltd.*, 650 F.2d 633, 635-36 (5th Cir. 1981); *Nunez v. Superior Oil Co.*, 535 F.2d 324, 324 (5th Cir. 1976) (per curiam), a view hard to reconcile with our acceptance in *Diamond* of judgments containing an order of dismissal, see 770 F.2d at 229-30. Judge Robinson clearly did not qualify his view that a judgment could recite the adoption of a magistrate's report without becoming a memorandum and order, and neither did the Tenth Circuit in *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990), where it explicitly accepted under Rule 58 a document that granted summary judgment. (In *Laidley* a timely notice of appeal had been filed, and thus the question before the court was whether it

had jurisdiction over a technically premature appeal—an issue that had already been resolved by the Supreme Court in *Bankers Trust*, 435 U.S. at 385-87. But the court stated its interpretation without dependence on that proposition.)

Thus we see no reason to abandon Chief Judge Robinson's view of the natural inferences from the panel's opinion in *Diamond*.

Accordingly the district court's order qualifies as a judgment under Rule 58.[1] We emphasize, however, that when a district court enters its final order disposing of the remaining claims in a case before it, it should ideally enter a second, separate document specifically labeled "judgment" corresponding as closely as possible to Forms 31 and 32 attached

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[1] On finding jurisdiction, our dissenting colleague understandably goes on to examine the merits. But even with an assumption of jurisdiction, defendants' contentions as to Kidd's non-compliance with Local Rule 108(h) pose an obstacle to doing so. Both the district court and the magistrate judge informed Kidd of her obligation under Local Rule 108(h) to provide "a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated," but the magistrate judge's report concluded that Kidd had not complied with the rule. The rule expressly provides that in the event of non-compliance material facts identified by the opposing side may be deemed admitted. See *Twist v. Meese*, 854 F.2d 1421, 1424-25 (D.C. Cir. 1988). The magistrate judge did not explicitly deem the District's statement of material facts admitted, but she did base her recommendation in part on a finding that Kidd failed to comply with Local Rule 108(h). Compare App. Amicus Curiae 940-41 (finding non-compliance by plaintiff with Local Rule 108(h)), with *id.* at 941-42 (finding defendants entitled to judgment as a matter of law "on the basis of the foregoing findings"). In affirming the magistrate judge's report and recommendation, the district court said that Kidd had neither provided any genuine issue of material fact in her objection to the report nor put forth an argument that would cause the Court to reject the report; it did not explicitly discuss the magistrate's ruling as to Local Rule 108(h).

to the Federal Rules of Civil Procedure.[2] Such a practice would save this court from having to make the kinds of distinctions that Rule 58 sought to eliminate. We have previously suggested that pro se litigants be given a simple form explaining the timing requirements for appeal when a final adverse judgment is entered. See *Moore*, 100 F.3d at 164. The same concerns suggest the wisdom of courts' using judgment forms that lie well within the heartland of Rule 58. But on the present record Kidd's appeal must be

Dismissed.

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[2] The Dissent notes that the judgment here was labeled "Order" rather than "Judgment." Dissent at 3. While we agree that the better practice is to label judgments as such, we have previously said that "a document labeled 'Order' rather than 'Judgment' may satisfy Rule 58 sufficiently to start the appeal clock running, if the order is succinctly to the point, and does not have the characteristics of an elaborate opinion. See *United States v. Perez*, 736 F.2d 236, 237-38 (5th Cir. 1984) (cautioning against "mindless" application of Rule 58)." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 n.4 (D.C. Cir. 1990) (Ruth Bader Ginsburg, J.).

TATEL, *Circuit Judge dissenting:* Although the issue in this case—what precisely constitutes a judgment within the meaning of Rule 58—seems technical, perhaps even formalistic, the stakes are actually quite high. For litigants, knowing with certainty whether a district court has entered a Rule 58 judgment is critically important. Not only does entry of a Rule 58 judgment start the clock for filing a notice of appeal, FED. R. APP. P. 4(a)(1), but a timely notice of appeal is jurisdictional; parties who fail to file a timely notice of appeal because they are unaware that Rule 58 judgments have been entered lose their right to appeal. *See, e.g., Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 163 (D.C. Cir 1996).

"Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to the litigants as a result of this uncertainty." *United States v. Indrelunas*, 411 U.S. 216, 220 (1973) (per curiam). "To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter," *id.*, Rule 58 was amended in 1963 to read: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth . . . ." FED. R. CIV. P. 58. Known as the "separate document rule," amended Rule 58 makes "clear that a party need not file a notice of appeal until a separate judgment has been filed and entered." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978) (per curiam). As the Supreme Court has recognized, the rule change "would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing . . . on the time for appeal." *Indrelunas*, 411 U.S. at 220 (internal quotation marks omitted). Accordingly, the Court has held, the Rule must be "mechanically applied in order to avoid new uncertainties." *Id.* at 222.

The Supreme Court has recognized only one exception to

the rule's "mechanical" application. In *Bankers Trust*, the Court confronted the issue whether the absence of a conforming Rule 58 judgment rendered a notice of appeal premature, depriving the appeals court of jurisdiction even though the district court had clearly intended to enter final judgment. Because "[t]he rule should be interpreted to *prevent* loss of the right of appeal, not to *facilitate* loss," the Court held that "[t]he need for certainty as to the timeliness of an appeal . . . should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." *Bankers Trust*, 435 U.S. at 386 (emphasis added) (internal quotation marks omitted).

Heeding the Supreme Court's directive to apply Rule 58 strictly to protect appeal rights, we have held that "a combined decision and order" cannot serve as a "judgment" within the meaning of Rule 58. *See Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985) (distinguishing between "decisions" of the district court and Rule 58 final judgments). In *Pack v. Burns Int'l Security Svc.*, 130 F.3d 1071, 1071-72 (D.C. Cir. 1997) (per curiam), we found that a document "stating that the motion to dismiss would be treated as conceded and granted" and giving several reasons for dismissal failed to comply with Rule 58. We reached the same conclusion in *Diamond*, 770 F.2d at 229-30, with respect to a document captioned "order" that gave the "basis, albeit briefly, of the court's reasoning, along with citations to legal authorities." The caption and the presence of the court's reasoning (including its citation to authority), we noted, meant that the order differed in "at least two significant respects" from Model Forms 31 and 32, which were passed contemporaneously with the amendment to Rule 58. *Id.* at 229 n.9.

> It is precisely this kind of uncertainty about whether the District Court intended to enter a final order that warrants the mechanical application of Rule 58. By

> mechanically applying this rule, as the Supreme Court has taught us to do, a court may avoid speculation as to whether an appellant should or should not have known that the time for appeal had begun to run.

Id. at 230 (footnote omitted). We concluded: "While we do not mean to suggest that the model form of judgment is the only means of complying with Rule 58, adherence to [that] format . . . would be of considerable assistance in eliminating uncertainty as to the nature of the District Court's action." *Id.* at 229 n.9.

Applying *Diamond* and *Pack* and taking account of Rule 58's purpose, I believe that the district court's order in this case represents a combined decision and order, not a Rule 58 judgment. As in *Diamond*, the order differs from Form 32 in two respects. *See id.* First, it is not labeled "Judgment." Instead, as were fifty-nine other documents issued by the district court and the magistrate judge in this case, some of which did no more than grant extensions of time, it was labeled "Order." Were this the order's only flaw, I would agree with the court that this insignificant departure from the model forms would not prevent us from finding that the order complies with Rule 58. *See* Maj. Op. at 10 n.2. But the order departs from the Model Forms in a second, "most critical[]" *(Diamond's* words) respect: it contains the district court's reasoning. Because Kidd had objected to the magistrate's recommendation and because Fed. R. Civ. P. 72 requires the district court to "make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made," the district court explained its reasoning: "In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation."

The only difference I can discern between this order and the order in *Diamond*, which we concluded was a combined decision and order, is that the *Diamond* order contained three sentences of reasoning, not one, together with several citations. In view of Rule 58's purpose—providing certainty—and our obligation to interpret Rule 58 "to *prevent* loss of the right of appeal, not to *facilitate* loss," *Bankers Trust*, 435 U.S. at 386 (emphasis added), these two differences cannot serve as a basis for distinguishing this case from *Diamond*. From a Rule 58 standpoint, the critical point is that the orders in both cases contained the district court's reasoning. It makes no difference that the district court in this case sets forth its reasoning in one sentence whereas the district court in *Diamond* used three. Suppose that instead of stating its reasoning in a single sentence, the district court here had broken its one sentence into two: "In her objection, Plaintiff still fails to raise any genuine issues of material fact[. I]n this recent filing[, she] does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report, and Recommendation." Would this departure from the "one sentence" rule my colleagues seem to adopt have persuaded them that the order was a combined decision and order?

This court also says that the order is a Rule 58 judgment because it lacks even the single citation it reads *Diamond* to permit. Although this "single citation" standard presumably means that the order would have passed as a Rule 58 judgment even if the district court had cited, for example, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the oft-used authority for Rule 56's summary judgment standard, suppose the district court had also included a citation to one of our cases for the same proposition or even to Rule 56 itself? Would my colleagues then have concluded this was not a Rule 58 judgment? Rule 58's amendment was intended to end just this type of uncertainty.

The court quotes Chief Judge Robinson's admonition that "trivial departures must be tolerated in the name of common sense." *See* Maj. Op. at 6 (quoting *Diamond*, 770 F.2d at 234 (Robinson, C. J., concurring)). I agree. They also point to his statement that an order "does not lose its character as a separate document simply because it includes a one-sentence explanation of what the order is all about, or a recital that a magistrate's report and recommendation are being adopted." *Diamond*, 770 F.2d at 234 (Robinson, C. J., concurring) (footnote omitted). I agree with this too. But the Kidd order goes beyond both "a one-sentence explanation of what the order is all about" and a "recital" that Magistrate Judge Robinson's report and recommendation are being adopted. *Id.* It sets forth the district court's *reasons* for adopting the report. Indeed, Chief Judge Robinson distinguished between the simple recitals he referred to as "trivial departures," *i.e.*, "explanation[s] of what the order is all about," and the court's reasoning: "On the other hand, orders combining the court's directives with its statement of factual findings or legal conclusions plainly cannot pass muster as separate documents." *Id.*

Suggesting that Chief Judge Robinson could not possibly have meant what he said, my colleagues conclude that the sentence "cannot be read to preclude a single sentence of explanation because the entire panel, with Judge Robinson in full agreement, had already found some minimal amount of legal reasoning to be consistent with Rule 58." Maj. Op. at 7. But listen again to Chief Judge Robinson's words. "[S]tatement[s] of factual findings or legal conclusions," he said, "plainly cannot pass muster as separate documents." *Diamond*, 770 F.2d at 234 (Robinson, C. J., concurring). And far from tolerating "minimal" reasoning, the *Diamond* court concluded that the order was not a Rule 58 judgment because it "provid[ed] the basis, albeit briefly, of the court's reasoning, along with citations to legal authorities."

Diamond, 770 F.2d at 229-230.

The standard my colleagues now adopt—an order is a Rule 58 judgment so long as it contains only "sparse" reasoning, Maj. Op. at 6—will require this court, contrary to the Supreme Court's warning against "case-by-case tailoring of the 'separate document' provision," *Indrelunas*, 411 U.S. at 221, to develop a common law of "sparseness." This will in turn produce the very uncertainty and "protracted litigation over a technical procedural matter" that Rule 58's amendment was designed to end. *Id.* at 220.

In my view, litigants, district courts, and this court would be better served by a bright line rule: Orders containing the district court's reasoning, three sentences or one, several citations or none, are not judgments within the meaning of Rule 58. To comply with such a rule, the district court need only instruct its clerk to issue judgments that adhere to the essence of Model Forms 31 and 32. Such a procedure would provide the certainty Rule 58 demands, prevent accidental loss of appeal rights, and ensure that this court will never again have to address this issue.

* * *

Because I would hold that Kidd's appeal is timely, I would reach the merits of her case and reverse. Even a cursory review of Kidd's *pro se* filings should have demonstrated to the magistrate judge who disposed of Kidd's case in three conclusory sentences that Kidd's primary allegation—that she was denied a promotion by the very District of Columbia officials against whom she had just won a substantial verdict for intentional infliction of emotional distress stemming from sexual harassment and forced sodomy by her supervisor—presented a strong prima facie case of retaliatory failure to promote as well as sufficient evidence of pretext to survive summary judgment.

In response, my colleagues offer still another reason why this court cannot reach the merits of Kidd's case. They point

out that the magistrate judge found that Kidd had failed to comply with Local Rule 108(h); citing *Twist v. Meese*, 854 F.2d 1421, 1424 (D.C. Cir. 1988), they also point out that "[t]he rule expressly provides that in the event of non-compliance material facts identified by the opposing side *may* be deemed admitted." Maj. Op. at 9 n.1 (emphasis added). But unlike in *Twist*, where the district court "relied on Rule 108(h) to hold that the material facts identified by the government were deemed admitted," 854 F.2d at 1424, the magistrate judge here chose not to deem the District's facts admitted, much less to rest her summary judgment recommendation on Kidd's failure to comply with Local Rule 108(h). Instead, the magistrate judge considered Kidd's evidence: "[T]he undersigned finds that plaintiff has failed to identify even a single material fact as to which a genuine issue for trial exists. Rather, both her motion and her opposition to defendants' motion are almost entirely comprised of her opinions of defendants' actions and characterizations of various statutes and decisions." The district court likewise did not rely on Local Rule 108(h): "In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation." Because neither the magistrate judge nor the district court relied on Kidd's failure to comply with the rule, nothing bars this court from reaching the merits of her case.

The D.C. Court of Appeals described the facts leading up to Kidd's sexual harassment lawsuit as follows. Shortly after Kidd began working for the Department of Administrative Services, her immediate supervisor, one Melvin Carter, "began calling her at home and once asked her when she would make love to him." *King v. Kidd*, 640 A.2d 656, 659 (D.C. 1993). "Carter showed Kidd documents demonstrating that she was a probationary employee" and told her that "because

of her probationary status, she could be fired at his recommendation and that no one would question anything." *Id.* He then called her and "ordered her to come to a nearby hotel." *Id.* Kidd hung up, but he called back, reminding her of her probationary status. She went to the hotel where they had sex. *Id.* Carter continued to "pursu[e] her," becoming "angry and loud" when she refused to have sex with him again. Carter also "took away her computer and her clerical assistant." *Id.* at 660. Kidd gave in and again had sex with Carter. "According to Kidd's testimony, Carter . . . forcibly sodomized her, rupturing her anal tissues and causing her to fear AIDS." *Id.*

Kidd complained to Carter's direct supervisor, Robert King, about "stress, harassment and mistreatment." *Id.* Receiving no relief, Kidd filed suit in Superior Court against Carter, King, Raymond Lambert (the director of the Department of Administrative Services), and the District alleging sexual harassment and intentional infliction of emotional distress. A jury found Carter, King, and Lambert personally liable for intentional infliction of emotional distress and Carter liable for sexual harassment as well. The jury awarded Kidd $300,000 in compensatory and punitive damages.

Kidd then returned to work. Believing the environment of the Department to be hostile—King and Lambert, both of whom had been found personally liable to her, were still there—Kidd applied for a transfer. Her request was denied. Kidd also applied for a promotion to a level DS-12. This request also was denied, and record evidence suggests that Lambert, one of the defendants in the Superior Court lawsuit who at the time was personally liable to Kidd for $260,000, took part in the decision to deny the promotion.

To establish a prima facie case of retaliation, Kidd must show that she engaged in activity protected by Title VII, that the District took an adverse employment action against her, and that the adverse action was causally related to the exer-

cise of her rights. *See Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 1999). Kidd satisfies all three elements of this standard: Her prior sexual harassment lawsuit is protected activity under Title VII; the District failed to promote her; and her evidence of causal connection—that the person denying her the promotion was personally liable to her for $260,000 at the time he denied the promotion—is overwhelming. Indeed, because Kidd's prima facie case "strongly suggests intentional discrimination[, it] may be enough by itself to survive summary judgment." *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1289 n.4 (D.C. Cir. 1998) (en banc). *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) ("[T]here may be some cases where the plaintiff's initial [prima facie] evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.").

Even if Kidd's prima facie case standing alone were insufficient, her evidence that the District's asserted nondiscriminatory reasons were pretextual, when considered in combination with the strength of her prima facie case, was enough to preclude summary judgment. *See Aka*, 156 F.3d at 1289 ("Assuming then that the employer has met its burden of producing a nondiscriminatory reason for its actions, the focus of proceedings at trial (and summary judgment) will be whether the jury could infer discrimination from the combination of (1) the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to plaintiff . . ."). Responding to the District's contention that she was not promoted from DS-11 to DS-12 because the Mayor had frozen hiring and promotions, Kidd submitted a sworn statement that her supervisor "requested a waiver of the Mayor's Order to promote another employee." She also stated that "[t]he

freeze apparently was arbitrary because Gary Hicka was brought on board as a DS-12 realty specialist . . . to fill one of the vacant positions." From this evidence that the Department made exceptions to the freeze for other employees, a jury could have concluded that the District's explanation was pretext for retaliation. *See Cones*, 199 F.3d at 519.

The District also claimed that Kidd was unqualified for a promotion to the DS-12 level, but Kidd provided evidence that in her DS-11 position, she performed work normally assigned to DS-12 employees. In fact, the District does not dispute that after a restructuring of the Department, many of the tasks she had been performing were taken from her and reassigned to employees at the DS-12, 13, 14, and 15 levels.

I have no idea whether a jury would have returned a verdict in Kidd's favor. But viewing the record in the light most favorable to Kidd and drawing all inferences in her favor, as we must at this stage of the case, I have no doubt the case should have gone to a jury.

In reaching this conclusion, I recognize the indications in the record that Kidd may have been a difficult plaintiff–the district court tried repeatedly to appoint counsel, and in each instance, counsel withdrew. I also recognize, as the magistrate judge found, that Kidd's *pro se* opposition to defendants' motion for summary judgment was neither succinct nor particularly successful at separating her legal arguments from her factual assertions. In contrast, we have had the benefit of *amicus's* masterful appellate brief. But even without that brief, had the magistrate judge carefully reviewed Kidd's pleadings, as she is required to do in *pro se* cases, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (holding *pro se* pleadings to less stringent standards than formal pleadings drafted by lawyers), she too would have seen that Kidd had a strong prima facie case of retaliation and sufficient evidence of pretext to preclude summary judgment.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD,	)	Filed August 3, 1994
Plaintiff,	)	
v.	)	**Civil Action No. 92-2897**
DISTRICT OF COLUMBIA, et al.,	)	
Defendants.	)	

ORDER

For the reasons expressed in the Court's Memorandum Opinion, it is this 3rd day of August, 1994, hereby

ORDERED that the defendants' motions to dismiss are GRANTED in part; and it is further

ORDERED that the plaintiff's claims against the District of Columbia, Mayor Kelly, John Payton, Marty Grossman, Eugene Adams, and Warren Cruise are DISMISSED; and it is further

ORDERED that the plaintiff's claims under the Equal Pay Act of 1964 and 42 U.S.C. § 1981, § 1983, and § 1985 are DISMISSED; and it is further

ORDERED that the defendants' motions to dismiss the plaintiff's Title VII and constructive discharge claims are DENIED without prejudice; and it is further

ORDERED that the plaintiff shall replead her Title VII

and constructive discharge claims with greater specificity by September 1, 1994.

/s/
Thomas F. Hogan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD,	)	Filed March 20, 1998
	)	
Plaintiff,	)	
	)	**Civil Action Nos.**
v.	)	**92-2897 &**
	)	**95-0611**
DISTRICT OF COLUMBIA, et al.,	)	**(TFH/DAR)**
	)	
Defendants.	)	

ORDER

Pending before the Court is Magistrate Judge Robinson's Report and Recommendation addressing Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) and Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 175). Plaintiff has filed an objection to this Report and Recommendation. (Docket No. 219). In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation. Therefore, it is hereby

ORDERED that Magistrate Judge Robinson's Report and Recommendation dated February 23, 1998 is AFFIRMED by the Court.

Consequently, it is

ORDERED that Defendant's Motion to Dismiss is DENIED, and that Defendant's alternative Motion for

Summary Judgement (Docket No. 175) is GRANTED; and it is further

ORDERED that Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) is DENIED.

March 19th 1998

/s/
Thomas F. Hogan
United States District Judge

APPENDIX D

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075 **September Term, 1999**

92cv02897
95cv00611

Patricia Kidd,
Appellant

v.

District of Columbia, et al.
Appellees

Filed On:

Filed
June 2, 2000

Consolidated with 98-7100

BEFORE: Silberman, Williams and Tatel, Circuit Judges.

ORDER

Upon consideration of appellant's *pro se* petition for rehearing filed April 24, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX E

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075 **September Term, 1999**

92cv02897
95cv00611

Patricia Kidd,
Appellant

v.

District of Columbia, et al.
Appellees

Filed On:

Filed
June 2, 2000

Consolidated with 98-7100

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of appellant's *pro se* petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Rogers did not participate in this matter.

APPENDIX F

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075

Filed On: June 2, 2000

PATRICIA KIDD,
APPELLANT

V.

DISTRICT OF COLUMBIA, ET AL.,
APPELLEES

Consolidated with
98-7100

BEFORE: EDWARDS, *Chief Judge*; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

ORDER

The petition for rehearing *en banc* of *amicus curiae* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Chief Judge EDWARDS and Circuit Judges SENTELLE, TATEL and GARLAND would grant the petition.

A statement of *Circuit Judge* TATEL, dissenting from the denial of rehearing *en banc*, joined by *Chief Judge* EDWARDS and *Circuit Judges* SENTELLE and GARLAND, is attached.

Circuit Judge ROGERS did not participate in this matter.

TATEL, *Circuit Judge*, with whom EDWARDS, *Chief Judge*, and SENTELLE and GARLAND, *Circuit Judges*, join, dissenting from the denial of rehearing en banc: In my view, this case raises a "question of exceptional importance" because the panel decision will produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent. I trust, however, that our district court colleagues will recognize that there is no disagreement on the panel that the simplest solution is for them to instruct the Clerk of Court to issue judgments adhering to Model Forms 31 and 32. By doing so, they will provide the certainty Rule 58 demands, prevent accidental loss of appeal rights, and ensure that this court will never again have to address this issue. *See Kidd v. District of Columbia*, 206 F.3d 35, 41 (D.C. Cir. 2000); *id.* at 44 (Tatel, J., dissenting).

APPENDIX G

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075 **September Term, 1999**

Patricia Kidd,
Appellant

v.

District of Columbia, et al.,
Appellees

MANDATE
Pursuant to Fed. R. App. P. 41(a)
ISSUED: 6.13.00

Consolidated with 98-7100

Appeals from the United States District Court
for the District of Columbia
(No. 92cv02897)
(No. 95cv00611)

Before: SILBERMAN, WILLIAMS and TATEL, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that these appeals are hereby dismissed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

Date: March 24, 2000
Opinion for the Court filed by Circuit Judge Williams.
Dissenting opinion filed by Circuit Judge Tatel.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF CIRCUIT

PATRICIA KIDD, PLAINTIFF	)	
v.	)	Civil Action No. 92-2897 (TFH) and 95-0611 (DAR)
DISTRICT OF COLUMBIA, et al. DEFENDANTS.	)	Appeals Docket: _____

NOTICE OF APPEALS

(1) Notice is hereby given this 30th day of April, 1998, that Pat Kidd, pro se, plaintiff in the above case(s), appeals to the United States Court of Appeals for the District of Columbia Circuit from all orders, motions, reports, and memoranda, including those dismissing claims against the District of Columbia, Mayors Kelly and Barry, John Payton, Marty Grossman, Eugene Adams, Warren Cruise, Department of Administrative Services, Raymond Lambert, Bruce Marshall, Barry Campbell, Lorraine Britton, Lorraine Green, William Reddick, Robert King, Timothy Edwards, and those dismissing plaintiff's claims under the Equal Pay Act of 1964 and 42 U.S.C. 1981, 1983 entered to favor the defendants sometime in 1994.

(2) Further, Pat Kidd, pro se, plaintiff appeals to preserve her rights from, denials to/of: protective orders, compel discovery, petitions for injunction and temporary restraining orders, motions for recusals and for equitable reliefs, obstruct cases' progress to include granting ninety-three (93) extensions of times, leave to amend complaints. Also, reversing the clerk's granting plaintiff default and from summary judgment dismissing claims of sex discrimination/

sexual harassment, constructive discharge, failure to accommodate a disability, and retaliation by Judge Robinson, upheld by Judge Hogan for the defendants, March 20, 1998.

(3) On April 28, 1998, Kidd personally obtained a copy of the order of summary judgment and the order dismissing her petition for temporary restraining order and recusal from Mr. Burgess, who identified himself as supervisor for Judge Hogan's law clerk, Ms. White. Kidd's affidavit is attached as exhibit A. Plaintiff found about about the ruling only through a response letter from the American Civil Liberties Union to her request soliciting legal services. The letter advised Kidd of the unfavorable ruling by the trial judge and advised her to seek counsel right away. Copy attached as exhibit B.

RECEIVED
APR 30 3 35 PM '98
U.S. DISTRICT COURT

/s/ 4/30/98
Pat Kidd, pro se
615 Roxboro Place, N.W.
Washington, D.C. 20011

I certify that a copy of the notice of appeal was filed and a copy mailed to Bruce Brennan, 441 4th Street, N.W., Washington, D.C. 20004, 30 April, 1998.

/s/
Pat Kidd, pro se

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF CIRCUIT

PATRICIA KIDD, PLAINTIFF	)	
v.	)	Civil Action No. 92-2897 (TFH) and 95-0611 (DAR)
DISTRICT OF COLUMBIA, et al. DEFENDANTS.	)	Appeals Docket: _____

Points and Authorities

1. Rules 3, 4, 8, etc.

AMERICAN CIVIL LIBERTIES UNION FUND
OF THE NATIONAL CAPITAL AREA
1400 – 20TH STREET, NW, WASHINGTON, DC 20036 / 202 457-0804

April 14, 1998

Ms. Patricia Kidd
P.O. Box 56017
Washington, DC 20011

Dear Ms. Kidd:

We received the materials you left at our office requesting assistance with your case, Kidd v. District of Columbia, in U.S. District Court. We reviewed the materials and we regret that we are not able to offer you legal help.

As you know ACLU exists to preserve and extend the constitutional rights and privileges found mainly in the Bill of Rights—rights such as the freedoms of speech, press, and religion; the right to be treated equally and without illegal discrimination; and the right to be free of abusive police conduct. As we have explained before, because of our slim resources we can take only a few cases each year. Thus we concentrate on "test cases" that raise important and unsettled questions of civil liberties, where our participation can affect a large group if we can establish better principles of law.

Our decision is based on our resources and priorities and is not a reflection of the merits of your claims. The court has recently reviewed the matter thoroughly (Report and Recommendation, dated February 23, 1998) and recommended defendants' motion for summary judgment be granted, so you do need legal advice right away to protect your rights.

We do not have resources to send back your papers. We

will hold them for pickup, or you can send $4.00 postage for their return by mail. If you do not send postage or retrieve the papers by April 30 we will discard them. We regret we can't be more help and we wish you well in your efforts to resolve the situation.

Sincerely,

/ s /

Fritz Mulhauser
Coordinator
Litigation Screening Committee

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF CIRCUIT

Exhibit **B**

PATRICIA KIDD,
PLAINTIFF

v.

DISTRICT OF COLUMBIA, et al.
DEFENDANTS.

Civil Action No. 92-2897 (TFH)
and 95-0611 (DAR)

Appeals Docket: _____

Affidavit of Pat Kidd

(1) I, Pat Kidd, pro se, plaintiff, retrieved from my post office box a letter from the American Civil Liberties Union, Fritz Mulhauser, responding to my solicitation for his organization's legal support. His letter, dated April 14, 1998, advised me that the judge had upheld the magistrate's report and ruled against me in favor of the defendants on summary judgment, Exhibit A. Post office box pickups occur once weekly.

(2) On Friday, April 24, 1998, I telephoned the pro se section. The representative confirmed that Judge Hogan's had issued two orders on March 20, 1998. Monday, April 27, 1998, 1 sent my assistant to obtain my orders from Judge Hogan's law clerk, Ms. White. The clerk was not in and a copy of the order was not available. A copy of the docket was provided. The following day, April 28th, I personally went to obtain my copies. I advised the intake clerk that I had become aware of the ruling from another source and of my concerns that as plaintiff, I had not been contacted nor privileged to a "procedural" call for pickup. That I did not see this as an isolated occurrence as the record so documents. The court clerk looking into the matter had Ms. White's supervisor, Mr. Burgess speak with me. Repeating my con-

cerns and protests. Mr. Burgess attested to Ms. White's efficiency—that nothing of this sort has happened involving her. While I can not direct blame I referenced mishaps documented in the record; so acknowledged that law clerks implemented a procedure to call me for pickup to insure I received or picked up copies at the clerk's desk (outside) of the clerk's door. This too was an an important order; the procedure should have been invoked.

(3) Mr. Burgess showed that copies of the orders were in the files. Copies sent to Carol Gordon, former counsel had been returned. I requested copies from Mr. Burgess whom I asked to assent personal receipt to me this April 28, 1998. Mr. Burgess obliged and will investigate this mishap, Exhibit C.

/s/

Signed Pat Kidd, pro se, (202) 726-1955
615 Roxboro Place, N.W., Wash., D.C. 20011

I /s/ certify that I am a notary of the public in D.C. and that Pat Kidd presented properly identified to sign this document this 30 day of Apr. 1998. My commission expires ___ day of _____, 1998.

My Commission Expires August 15, 1999
Petruzelli Days